Yong Geok Jin & Ors v Langkah Cerdas Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–28–659 OF 2005
NOOR AZIAN SHAARI J
17 JANUARY 2008

Companies and Corporations — Service of notice pursuant to Companies Act 1965, s 218 — Whether s 218(2) of the Companies Act 1965 could be applied disjunctively

Companies and Corporations — Winding up — Inability to pay debts — Whether respondent unable to pay its debts within meaning of s 218(1)(e) of the Companies Act 1965

The petitioners sought to wind up the respondent under s 218(1)(e) of the Companies Act 1965 ('the Act') as it had failed to pay the petitioners a judgment sum of RM1,652,375 obtained on 29 April 2005. The issue to be determined by the court was whether the respondent was 'unable to pay its debts' within the meaning of s 218(1)(e) of the Act. The respondent argued that the order obtained on 29 April 2005 was an interim order and that the respondent had not neglected to pay its debts. Further, the respondent argued that the provisions of s 218(2)(a), (b) and (c) of the Act were not applicable as they were all not complied with.

Held, allowing the petition with costs:

(1) Despite the respondent filing an appeal against the order of 29 April 2005 it did not operate as a bar for the petitioners to file a winding up petition. Applying the principles in the decided cases, the appeal also did not act as a stay (see para 16).

(2) Section 218(2) of the Act must be read disjunctively as the word 'or' appears after para (b). Therefore if any situation in paras (a), (b) or (c) arises then there is a situation of inability to pay the debts. As the respondent had not complied with the order of 29 April 2005, the respondent have been deemed to be unable to pay its debts under s 218(2) of the Act (see paras 20–21).

[Bahasa Malaysia summary

Pempetisyen mengambil tindakan untuk menggulungkan responden di bawah s 218(1) Akta Syarikat 1965 ('Akta tersebut') kerana ia telah gagal untuk membayar pempetisyen jumlah penghakiman sebanyak RM1,652,375 yang diperolehi pada 29 April 2005. Isu yang perlu ditentukan oleh mahkamah adalah sama ada responden 'tidak boleh membayar hutangnya' dalam makna s 218(1)(e) Akta tersebut. Responden menghujah bahawa perintah yang diperolehi pada 29 April 2005 adalah perintah sementara dan responden tidak mengabaikan untuk membayar hutang-hutangnya. Seterusnya, responden berhujah bahawa peruntukan-peruntukan s 218(2)(a), (b) dan (c) Akta tersebut tidak dapat digunapakai kerana kesemuanya tidak dipatuhi.

Diputuskan, membenarkan petisyen dengan kos:

(1) Meskipun responden memfailkan rayuan terhadap perintah bertarikh 29 April 2005 tersebut ia tidak berfungsi sebagai penghalang untuk pempetisyen memfailkan petisyen penggulungan. Menggunapakai prinsip-prinsip di dalam kes-kes yang telah diputuskan, rayuan tersebut juga tidak bertindak sebagai satu penggantungan (lihat perenggan 16).

(2) Seksyen 218(2) Akta tersebut hendaklah dibaca secara berasingan memandangkan perkataan 'atau' muncul selepas perenggan (b). Oleh itu jika sebarang situasi dalam perenggan-perenggan (a), (b) atau (c) timbul maka akan ada situasi ketidakupayaan membayar hutang-hutang. Memandangkan responden tidak mematuhi perintah bertarikh 29 April 2005 tersebut, responden telah dianggap tidak berupaya membayar hutang-hutang beliau di bawah s 218 Akta tersebut (lihat perenggan 20–21).]

Notes

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1081–1142.

For cases on service of notice pursuant to s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1509–1510.

Cases referred to

Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657 (refd)

LKM Investment Holdings Ltd v Cathay Theatres Pte Ltd [2000] 1 SLR 692 (refd)

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263 (refd)

Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602 (refd)
Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd [2006] 4 CLJ 583 (refd)

Legislation referred to
Companies Act 1965 s 218(1)(e), 218(2)(a), 218(2)(b), 218(2)(c)
Rules of The High Court 1980 O 18 r 19, O 22A r 1(a)

Havinder Kaur (Katherine Durai with her) (AJ Ariffin Yeo & Harpal) for the petitioner.
Amarjeet Singh (SP Chandra with him) (Manjeet Kaur & Associates) for the respondent.

Noor Azian Shaari J:

[1] By this petition, the petitioners pray that the respondent be wound up under s 218(1)(e) of the Companies Act 1965 ('the Act').

[2] I heard the petition on the 4 January 2008 and allowed it, hence the appeal by the respondent.

[3] Before I proceed to give my reasons for allowing the petition I am of the opinion that it is pertinent I list the events that had taken place before finally I could hear the petition. The events do not constitute the reasons for my decision but I feel it is good for record purposes.

[4] The file pertaining to this petition was first handled by me on 25 January 2007. Since on that date the file was missing and never found I cannot say what had transpired before that date. As such I will list below only as to what happened on 25 January 2007 until encl (1) of the petition was disposed of, ie on 4 January 2008. Below is the list of events in chronological order:

1) 25 January 2007	— file missing
	— court was informed that the respondent had filed an affidavit on 11 January 2006 opposing the petition
	— 8 March 2007 fixed by court for next mention date
2) 8 March 2007	— file still missing
	— counsel for the respondent was not present
	— court was informed that the respondent had on 9 November 2005 filed an application to strike out the petition

	— since the file was missing court gave directions that if the file is not found the file would have to be reconstructed
	— 24 May 2007 was fixed for next mention date
3) 24 May 2007	— file was still missing
	— petitioners' counsel informed the court that petitioner was ready to reconstruct the file and all the documents are ready
	— court directed petitioners' counsel to see the deputy registrar re the reconstruction of the file. — 21 June 2007 was fixed for the next mention date
4) 21 June 2007	— file reconstructed
	— court fixed encl (8) ie the respondent's application to strike out the petition for hearing on 23 November 2007 at 9.30am
5) 23 November 2007	— the file was again missing
	— the respondent's counsel said she was not ready as she knew that the court file was missing and said file needed to be reconstructed again. As such she did not prepare her case
	— court stood down the matter and eventually proceeded to hear the application in encl (8) at 3.05pm
.	— the respondent was represented by SP Chandra & Amarjeet Singh, after hearing the parties, encl (8) was dismissed with cost
	— encl (1) was fixed for hearing on 4 January 2008 at 11am with directions that parties are to bring written submissions to be argued
6) 4 January 2008	— the petition (encl (1)) was heard and it was allowed

[5] On 4 January 2008, at the beginning of the proceedings, a lawyer by the name of Peter Ting was present and he claimed to appear or act for petitioner No 42 ('P42'). He informed the court that:

(1) P42 wishes to discontinue with the petition;

(2) he had filed a summons in chambers on 3 January 2005 praying that the whole petition be struck out under O 18 r 19 of the Rules of the High Court 1980; and

(3) that his application vide the summons in chambers should be heard first.

[6] The petitioners' counsel objected to Peter Ting's presence and the request. Since there was nothing on record to show that P42 had discharged

his solicitors and the summons in chambers was just filed, I proceeded to hear encl (1). I also made a ruling that Peter Ting had no locus standi in the matter and did not allow him to be present in the proceedings. A

[7] It is worth noting that counsel for the petitioners informed the court that when the summons in chambers that was filed by Peter Ting was served on her firm, a copy of a bill by Peter Ting's firm (Messrs Hazman Tan, Advocates and Solicitors) addressed to the respondent for payment of 'professional charges' and with head note 'Miscellaneous Matter in connection with the winding up application Langkah Cergas Sdn Bhd' was also mistakenly served on the petitioners' solicitors. B C

[8] Further, when I began the proceedings to hear the petition I was surprised that the respondent's counsel (Amarjeet Singh) stated that he did not prepare any written submission and when told that he was present in court on 23 November 2007 when I directed written submissions he exclaimed 'Is it?'. D

[9] It is really amazing to note as to what had transpired in respect of this case before I could finally dispose of the matter. E

[10] All said and done, I proceeded to hear the parties re encl (1), the petition.

[11] The petitioners pray that the respondent be wound up under s 218(1)(e) of the Act as it had failed to pay the petitioner the judgment sum of RM1,652,375 as ordered by the High Court Kuala Lumpur on 29 April 2005 vide Civil Suit No S1–22–1351 of 2002. F

[12] The issue to be determined by the court is whether the respondent is 'unable to pay its debts' within the meaning of s 218(1)(e) of the Act under which provision the petition is presented. G

[13] The respondent opposed the application and in the affidavit opposing the petition the respondent stated that: H

(1) there is an appeal in the Court of Appeal against the order of 9 April 2005 and that the order is not final;

(2) the 'respondent had not neglected to pay the demanded sum'; and I

(3) not be equitable to wind up the respondent as the order being relied on by the petitioner is a nullity and the respondent have in the alternative to the appeal have directed its solicitors to file an application to set aside the order.

[14] Initially the respondent's counsel began submitting orally but along the way I gave him time to prepare a written submission. In his submission counsel for the respondent raised the following:

(1) Section 218(2)(b) or (c) of the Act does not apply as the requirements have not been complied. The requirements being —

(a) the petitioners must be creditors which in this case they are not as the order is an interim order; and

(b) there was no neglect to pay by the respondent; and

(2) the averment in the statement of defence filed in the mentioned civil suit 'could not constitute an admission of liability'.

[15] However, the following facts are not disputed:

(1) an interim order was made on 29 April 2005;

(2) a s 218 notice was serve on the respondent;

(3) the respondent has not paid the judgment sum; and

(4) the respondent has appealed against the court order of 29 April 2005.

[16] Although the respondent had filed an appeal against the order of 29 April 2005, it is not a bar for the petitioner to file a winding up petition. It has been decided in the cases listed below that an appeal does not act a stay:

(1) In *LKM Investment Holdings Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR 692 at p 693, the court held that 'It is not an abuse of process for a judgment creditor to present a winding up petition against the judgment debtor because the judgment is under appeal.';

(2) In *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 it was held that 'The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is bona fide disputed'; and

(3) In *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602, it was held (at p 603) that 'A judgment for a sum establishes a debt, which then becomes due to the person to whom it is owed, who then becomes a creditor. The sum remains due even through the debtors appeal against the judgment is pending, because *an appeal does not operate as a stay of execution*.'
(Emphasis added.)

[17] Section 218(1) of the Act provides that:

218(1) The court may order the winding up if —

(e) the company is unable to pay its debts;

[18] In *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd* [2006] 4 CLJ 583, it was stated that 'It is instructive to note that even a default judgment is a good and enforceable judgment to form the basis for supporting a winding up petition: per Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263'.

[19] In the present case the order of 29 April 2005 may be an interim order but still a judgment and it is clear as the word 'interim' suggest it will from part of a final order. Though it is not for me to query or question this order it must also be noted that the respondent had clearly and unequivocally admitted liability in the statement of defence and hence the order of 29 April 2005 under O 22A r 1(a) of the Rules of the High Court 1980.

[20] The respondent's counsel submitted that s 218(2)(b) or (c) of the Act does not apply stating that, 'the disjunctive application of s 218(2)(c) as argued and submitted by the petitioners' counsel cannot apply'. However, I disagree with the respondent's counsel and on the other hand totally agree with the petitioners' counsel that since the respondent had not complied with the court order the respondent is deemed to be unable to pay its debts under of s 218(2) of the Act which provides that:

(a) a creditor to whom the company is indebted in a sum exceeding RM500 has served a demand on the company and the company neglects to pay the sum within three weeks of the s 218 notice is served;

(b) order of the court in favour of the creditor remains unsatisfied; or

(c) it is proven that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

[21] Section 218(2) of the Act must be read disjunctively as the word 'or' appears after para (b). Therefore if any of the situations in paras (a), (b) or (c) arises then there is situation of inability to pay debts. In this case, the respondent falls under all three paras (a), (b) and (c), the respondent had not only neglected to pay up after notice under s 218 was served, there is also a court order and the respondent had also not honored the order of the Housing Tribunal that has commenced proceedings against the respondent. Further, the respondent is also indebted to six supporting creditors.

[22] For the reasons stated above, I find that the respondent is not able to pay its debts and therefore I allowed the petition, the official receiver be appointed as liquidator and costs.

Petition allowed with costs.

Reported by Dipendra Harshad Rai